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Attorneys for Defendants  
See Signature Page

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HARRIS L. WINNS,  
  
Plaintiff,  
  
v.

BLAKELY SOKOLOFF TAYLOR &  
ZAFMAN, LLP, ANTHONY INTIL, CANDY  
MIELKE, JIM SALTER, MICHAEL MALLIE,  
JOHN P WARD, ED TAYLOR, DAN DEVOS,  
DIANE ROBSON, LESTER VINCENT STEVE  
ZELMAN, DAVE MONTOYA, KAREN  
WILSON, TAREK FAHMI, LAURA E. INNES,  
RONALD F. GARRITY, CHARLES WALL

Defendants.

CASE NO.: C08 02622 JW

**DEFENDANTS' REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANTS' 12(b)(6)  
MOTION TO STRIKE**

Date: November 3, 2008  
Time: 9:00 a.m.  
Dept.: Courtroom 8, 4<sup>th</sup> Floor  
Judge: Hon. James Ware

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**I. Introduction**

Plaintiff opposes Defendants' Motion to Dismiss, arguing for later accrual of his causes of action, equitable tolling and equitable estoppel. However, Plaintiff's arguments are based on faulty legal reasoning, and his outrageous claims lack even basic factual support.

**II. Legal Argument****A. Plaintiff has not set forth facts showing he relied to his detriment on any statement or representation made by Defendants.**

Plaintiff apparently contends Defendants are estopped from asserting a statute of limitations defense because Plaintiff allegedly relied to his detriment on statements made by the attorney he retained to represent him in Defendant's action for a Workplace Violence restraining order. Plaintiff has not stated a valid claim for equitable estoppel, however, because he has not stated any facts indicating Defendants made any representations to him on which he relied.

A finding of equitable estoppel with respect to a limitations period rests on the consideration of a non-exhaustive list of factors, including: (1) the plaintiff's actual and reasonable reliance on the defendant's conduct or representations; (2) evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct; and (3) the extent to which the purposes of the limitations period have been satisfied. Pedigo v. County of Los Angeles, (9<sup>th</sup> Cir. Cal. 2001) 24 Fed.Appx. 779; Santa Maria v. Pacific Bell, (9<sup>th</sup> Cir. Cal. 2000) 202 F.3d 1170.

Plaintiff has not set forth any wrongful conduct of Defendants in support of his claim for equitable estoppel based on "detrimental reliance." Instead, Plaintiff states he relied on a representation made by his own attorney, based on information his attorney allegedly obtained from an attorney representing Defendants.

Any representations made to Plaintiff by his own counsel can in no way be attributed to Defendants. Further, any representations made by Defendants' attorney with regard to the Workplace Restraining Order action are protected by the litigation privilege, Cal.Civ.Code § 47, as

1 set forth more fully in Defendants' Rule 12(b)(6) Motion to Dismiss and Defendants'  
2 Cal.Civ.Proc.Code § 425.16 Anti-SLAPP motion. The statutes of limitations on Plaintiff's causes  
3 of action are therefore not subject to equitable tolling, because Plaintiff did not rely to his detriment  
4 on any statements made by Defendants.

5  
6 **B. Plaintiff has not set forth facts showing Defendants concealed any facts relevant to any  
7 cause of action against him.**

8 Plaintiff apparently also asserts the statutes of limitations on his cause of action are subject  
9 to equitable estoppel due to the "fraudulent concealment" occasioned by the Santa Clara Superior  
10 Court's dismissal of his Complaint after his failure to timely file an Amended Complaint.

11 For equitable estoppel to bar the defendant from asserting a statute of limitations defense,  
12 the plaintiff must point to some fraudulent concealment -- some active conduct by the defendant  
13 above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff  
14 from suing in time. Lukovsky v. City and County of San Francisco, (9<sup>th</sup> Cir. Cal 2008) 08 Cal.  
15 Daily Op. Serv. 10, 240; Kay v. Wells Fargo & Co., (N.D. Cal. 2007) 247 F.R.D. 572.

16 Again, Plaintiff points to no actions by Defendants which may have constituted an act of  
17 concealment. Instead, Plaintiff harangues this Court with protests over Defendant's valid *ex parte*  
18 Motion to Dismiss Plaintiff's Complaint after Plaintiff failed to timely file an Amended Complaint,  
19 admonishes the Superior Court's filing system, and personally attacks attorney Nancy McCoy.  
20 Plaintiff has not contended that information was concealed from him at all, therefore Plaintiff has  
21 failed to state any facts supporting his claim for equitable estoppel.

22 **C. Plaintiff's assessment of when his causes of action accrued is incorrect.**

23 Plaintiff claims his causes of action did not accrue until the Workplace Violence Restraining  
24 Order ceased to affect his life. However, Plaintiff's understanding of the accrual of a cause of  
25 action is erroneous.

26 "Accrual" is the date on which the statute of limitations begins to run; under federal law, a  
27 claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the  
28 action. Parrish v. National Football League Players Ass'n, (N.D. Cal. 2007) 534 F.Supp.2d 1081.

1 Generally, a claim accrues at the time the injury occurs. An exception to this is the discovery rule  
2 which postpones accrual of a claim until the plaintiff discovers or has reason to discover the injury.  
3 Miller v. Davis, (C.D. Cal. 2006) 420 F.Supp.2d 1108.

4 Each of Plaintiff's causes of action accrued for purposes of the statute of limitations when  
5 the allegedly wrongful conduct occurred. As stated in Defendants' Motion to Dismiss, Plaintiff's  
6 Complaint is vague and ambiguous, and largely fails to state which actions Defendants took to  
7 cause Plaintiff's harm. However, the only two adverse actions Defendants ever took against  
8 Plaintiff, the termination and the Workplace Violence Restraining Order, occurred more than 6  
9 years before Plaintiff filed this Complaint. Plaintiff's causes of action therefore accrued 6 years  
10 ago.

11 Plaintiff has not alleged that he failed to "discover" his injury or the facts supporting his  
12 cause of action until later. Indeed, Plaintiff's Complaint reveals Plaintiff was well aware of the  
13 circumstances surrounding his termination and the circumstances surrounding the Workplace  
14 Violence Restraining Order when each action was taken.

15 Plaintiff appears to count the statute of limitations from the date the Workplace Violence  
16 Restraining Order stopped affecting his life. As an initial matter, Plaintiff's understanding of the  
17 effect of the restraining order is incorrect. As this Court will recall from Defendants' Request for  
18 Judicial Notice in support of Defendants' Motion to Dismiss, the Workplace Violence Restraining  
19 Order against Plaintiff was dismissed on March 15, 2005, not April 2007, as Plaintiff contends.

20 Furthermore, the fact that harm may be ongoing does not affect the date upon which a claim  
21 accrues. Delaware State College v. Ricks, (1980) 149 U.S. 250. In the Delaware State College  
22 case, the Supreme Court examined a plaintiff's claim that the statute of limitations on his  
23 employment discrimination cause of action should run from the date his termination became  
24 effective, rather than the date he was notified of the College's intent to terminate him, one year  
25 prior. The Court held: "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the  
26 time at which the *consequences* of the acts became most painful...It is simply insufficient for Ricks  
27 to allege that his termination gives present effect to the past illegal act and therefore perpetuates the  
28

1 consequences of forbidden discrimination.” Delaware State College at 258.

2 Here, Plaintiff attempts the same argument as the plaintiff in the Delaware State College  
3 case. He contends the statutes of limitations on his causes of action should not begin to run until  
4 the effects of Defendants’ allegedly wrongful conduct ended. This reasoning is clearly incorrect.  
5 Whatever causes of action Plaintiff may have had accrued at the time of the allegedly wrongful  
6 conduct, more than 6 years ago.

7  
8 **D. Plaintiff has not set forth facts showing exceptional circumstances sufficient to toll the**  
9 **Statute of Limitations.**

10 Plaintiff’s final argument asserts the statutes of limitations are subject to the doctrine of  
11 equitable tolling based on “exceptional circumstances.” In so doing, Plaintiff cites a myriad of  
12 cases allowing equitable tolling in instances of severe, overt racial discrimination. However,  
13 Plaintiff sets forth no facts justifying the application of equitable tolling in this case.

14 A litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he  
15 has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his  
16 way. Logan v. Hall (9<sup>th</sup> Cir. Cal. 2006) 207 Fed.Appx. 872.

17 Here, Plaintiff began his attempt to vindicate his legal rights in August 2007, five years after  
18 he was terminated from his position with BSTZ and had a Workplace Violence Restraining Order  
19 entered against him. Plaintiff had done nothing to pursue his rights in the preceding five years, and  
20 therefore cannot be said to have been pursuing his rights diligently.

21 In addition, the “exceptional circumstances” Plaintiff asserts are nothing more than  
22 derogations of the Superior Court’s alleged impartiality and competence, and naked conclusory  
23 statements regarding his “fear for [his] life.” Plaintiff has not set forth a single act performed by  
24 Defendants that would engender any fear whatsoever, let alone acts rising to the level of torment  
25 inflicted by slave masters or the KKK. Furthermore, if Plaintiff took issue with any of the actions  
26 of the Superior Court, Plaintiff’s proper recourse is an appeal, not an action in Federal Court.

27 As Plaintiff has not diligently pursued his legal rights, and has not set forth any valid  
28 exceptional circumstances for this Court’s consideration, the statutes of limitations for Plaintiff’s

causes of action may not be tolled.

### III. Conclusion

Plaintiff has concocted yet another masterpiece of legal fiction in an attempt to persuade this Court to ignore the rule of law and vindicate his long-festering complaints. In place of factual support and sound legal reasoning, Plaintiff fills his brief with threats, hyperbole and childish admonitions. Plaintiff has shown once more that he intends only to abuse the legal process to harass and frustrate Defendants, causing grossly unwarranted expenditures of time and resources. Defendants therefore respectfully request that this Court grant their Motion to Dismiss, and dismiss Plaintiff's action.

Date: August 28, 2008

STRAZULO FITZGERALD, LLP

By /s/

Nancy L. McCoy  
Cortney L. McDevitt  
Attorneys for Blakely Sokoloff Taylor & Zafman,  
LLP, Anthony Intil, Candy Mielke, Michael  
Mallie, John P. Ward, Ed Taylor, Dan Devos,  
Diane Robson, Lester Vincent, Steve Zelman,  
Dave Montoya, Karen Wilson and Tarek Fahmi

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CASE NAME: Winns v. Blakely Sokoloff, et al  
NORTHERN DISTRICT/ SAN JOSE DIVISION ACTION NO: C08 02622 JW

**PROOF OF SERVICE**

I am a citizen of the United States. My business address is 275 Battery Street, Suite 200, San Francisco, California, 94104. I am employed in the county of San Francisco where this service occurs. I am over the age of 18 years and not a party to the within cause.

On August 28, 2008, I served the following document(s) described as:

**DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION  
TO DEFENDANTS' 12(b)(6) MOTION TO STRIKE**

**X BY MAIL:** I am readily familiar with my employer's normal business practice of collection and processing of correspondence for mailing. Under that practice, correspondence is deposited with the U.S. Postal Service that same day in (a) sealed envelope(s) with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business.

☐ **BY FAX:** I served said document(s) by transmitting via facsimile from facsimile number 415.394.9501 to the facsimile number(s) set forth below, or as stated on the attached service list, on this date before 5.00 p.m. A statement that this document was successfully transmitted without error is hereby attached to the Proof of Service.

**BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).

☐ **BY OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered on the same day to an authorized courier or driver or to a regular box or other facility regularly maintained by **FEDERAL EXPRESS** with delivery fees provided for, addressed to the person(s) on whom it is to be served.

on the interested party(ies) in this action addressed as follows:

HARRIS L. WINNS  
2610 Sierra Vista Ct.  
San Jose, CA 95116  
Tel: (408) 835-8872

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 28, 2008, at San Francisco, California.

\_\_\_\_\_/s/  
Alice Kay

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